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Humanitarian Intervention in a Post-Iraq, Post-Darfur World: Is There Now a Duty to Prevent Genocide Even Without Security Council Approval?

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HUMANITARIAN INTERVENTION IN A POST-IRAQ, POST-DARFUR WORLD: IS THERE NOW A DUTY TO PREVENT GENOCIDE EVEN WITHOUT SECURITY COUNCIL APPROVAL?

SARAH MAZZOCHI*

Scores of ink have been spilled to address the question of whether there is a duty to prevent genocide even without Security Council approval. Most who have written on the subject have come down firmly supporting the United Nation's Charter and the general prohibition on the use of force except for in situations involving self-defense or where use of force has been approved by the Security Council. One of the main reasons scholars have sided with the sovereignty¹-Security Council side of the debate is that aggressive states, if they could, would use unilateral intervention for human rights reasons as a pretext for furthering their

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1. Sovereignty, or rather the sovereign equality of all states, is often invoked as the main reason intervention is lawful only with Security Council approval under the UN Charter. Essentially, because all states are equal in the eyes of public international law, no state has the right to interfere with another's sovereign territory unless there is an extremely good reason to do so, such as to prevent genocide. See U.N. Charter art. 2, para 1.

own illegitimate policies, such as Hitler did when Germany invaded Sudetenland in 1938.²

After a brief lull in human rights violations following the end of World War II, human rights violations, especially genocide, seemed to emerge again overnight in the 1990s and extend into the first decade of the 21st century. Hundreds of thousands of lives were lost, and, in some cases, the Security Council failed to act. The failure of the Security Council to take action renewed the vigor of some scholars calling for a change in the international legal landscape to properly address this reality. Whatever momentum the legal community seemed to have gained in recognizing a change in the law of humanitarian intervention was brought to a halt during the U.S.-led invasion of Iraq in 2003. However, the genocide that occurred just a short while later in Darfur has renewed this debate. And so, the question remains: Is there now a right to unilateral humanitarian intervention in a post-Iraq, post-Darfur world? This Article seeks to answer that question.

Part I will address the background and historical evolution of unilateral humanitarian intervention as well as give examples of state action or inaction in cases of genocide. Part I will also give the legal framework for the U.N. Genocide Convention. Part II will discuss the law of humanitarian intervention as it is commonly accepted today. Part III will point to the future and argue that the law of humanitarian intervention should be, going forward, a *jus cogens* norm. Part IV will offer a brief conclusion about humanitarian intervention in situations amounting to genocide, and it will point to what the future will likely be when there is a duty to prevent genocide, regardless of Security Council approval.

I. BACKGROUND AND EVOLUTION

A. HISTORICAL EXAMPLES

(i) 1960-1990s

By some estimates, the use of force by states has occurred some 690 times since the passage of the UN Charter in 1945 until 1989.³ It has been most often justified on the grounds of self-defense pursuant to Article 51.⁴ However, many examples of unilateral humanitarian

2. Letter from Reich Chancellor Hitler to Prime Minister Chamberlain (Sept. 23, 1938), *The Crisis in Czechoslovakia* Apr. 24-Oct. 13, 1938, in 19 INT'L CONCILIATION 433, 433-35 (1938).

3. See U.N. Charter; Herbert K. Tillema, *Risks of Battle and the Deadlines of War: International Armed Conflicts*, paper presented to the INT'L STUDIES ASS'N, San Diego, Apr. 16-29.

4. U.N. Charter art. 51; Tillema, *supra* note 3.

intervention date back to the 1970s.⁵ For instance, in 1971, India invaded East Pakistan under the guise that it was an act of self defense and because of the inhuman conditions suffered by the Bengali population.⁶ The Security Council, and particularly the United States, objected to India's use of force.⁷ Vietnam invaded Cambodia in 1978 to stop the Khmer Rouge's genocide against its own people.⁸ Vietnam also relied on the self-defense justification.⁹ The Security Council debated this proposition with many states and asserted unilateral intervention for human rights reasons was not permitted under the U.N. Charter.¹⁰ Tanzania invaded Uganda in 1979, and toppled the dictator Idi Amin who had committed many atrocities against his people.¹¹ Tanzania partially relied on humanitarian grounds to do so.¹² The attack was not debated in the United Nations at all, but the international community later derided Tanzania's actions.¹³ France intervened in the Central African Republic in 1979 after the atrocities committed by Emperor Bokassa.¹⁴ The Organization of African Unity Judicial Commission condemned his actions, but there was still no mandate by the world community to intervene for humanitarian reasons.¹⁵

(ii) Rwanda (1994)

Perhaps the most famous modern example of the world community's inaction over gross human rights violations occurred in Rwanda in the mid-1990s. In 1994, the Hutu majority in Rwanda began killing the Tutsi minority population.¹⁶ Rwanda's ethnic clash between the Hutus and Tutsis was predominately a product of European colonialism.¹⁷ Germany, and later Belgium, colonized what is now known as Rwanda in the 19th century and made a class system based on skin tone and facial

5. See ANTONIO CASSESE, *INTERNATIONAL LAW* 373 n.29 (Oxford Univ. Press, 2nd. ed. 2005).

6. *Id.*

7. *Id.*

8. GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 135 (Bookings Inst. Press, 2008).

9. CASSESE, *supra* note 5, at 373 n.29.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Leilani F. Battiste, *The Case for Intervention in the Humanitarian Crisis in the Sudan*, 11 ANN. SURV. INT'L & COMP. L. 49, 61 (2005). For Hollywood's take on the Rwandan Genocide, see *Hotel Rwanda*.

17. SARAH HYMOWITZ & AMELIA PARKER, GROUP ONE: THE HUTUS AND THE TUTSIS, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW CENTER FOR HUMAN RIGHTS AND HUMANITARIAN LAW, <http://www.wcl.american.edu/humright/center/rwanda/jigsaw1.pdf?rd=1> (last visited Apr. 27, 2011).

114 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XVII]

features.¹⁸ The lighter skinned Tutsis were treated as being racially superior to the darker skinned Hutus.¹⁹ Over the years, this created a great deal of animosity towards the Tutsis, and the group was periodically attacked.²⁰ After 200,000 Tutsis were forced to flee to Uganda, they regrouped into what was known as the Rwandan Patriotic Front.²¹ Their aim was to achieve political equality for the Tutsis and to counter the predominately Hutu government.²²

Violence escalated throughout the early 1990's and erupted in 1994.²³ In March of the same year, weapons were given to Hutu civilians.²⁴ A month later, Rwandan President Juvenal Habyarimana was killed when his plane was shot down.²⁵ The Tutsis, particularly the Rwandan Patriotic Front, were blamed for the attack.²⁶ The Rwandan army and armed militia were deployed against the alleged perpetrators, and for the next 100 days, a genocidal fury swept the small African nation.²⁷ Most of those killed were unarmed Tutsi civilians.²⁸

Intervention was non-existent during the crisis.²⁹ What is more disturbing is that after the killings began, the U.N. Security Council cut the U.N. forces in Rwanda from 2,500 down to a bare 800.³⁰ The crisis lasted for 100 days, and, when it was over, approximately 800,000 Rwandans had died.³¹ At the time, the U.N. and the world community refused to call the crisis genocide.³² Several members of the Security Council chose not to use the term "genocide" to describe what was happening in Rwanda, because, if it was genocide, these states believed there was a corresponding duty to prevent it.³³

The failure to provide humanitarian intervention in Rwanda is considered one of the worst international mistakes in recent history. Five years after the killing began, President Clinton traveled to Rwanda to apologize for

18. *Id.*

19. *See* Battiste, *supra* note 16, at 62.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 61.

30. *Id.*

31. *Id.* at 61-62.

32. *Id.* at 62.

33. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 529 (Cambridge Univ. Press, 2nd. ed. 2009).

not intervening, and he pledged that the United States would never again fail to prevent such a catastrophe.³⁴

(iii) Kosovo (1999)

The most commonly discussed example in recent memory of humanitarian intervention without Security Council authorization, and without a self-defense justification, was NATO's intervention in Kosovo in 1999.³⁵ The Security Council had not authorized the intervention in Kosovo, but many argued the need to use force was justified because of the humanitarian catastrophe committed by the Serbs in Kosovo.³⁶ The United States, the United Kingdom, France, Canada, Belgium, the Netherlands, and Italy, among others, supported the intervention.³⁷ Other states such as Russia, China, Cuba, Belarus, Ukraine, Namibia, and India objected to the use of force because the Security Council had not authorized it.³⁸ Afterward, the integrity of the entire international system was called into question with many considering the Kosovo intervention justified on moral grounds because of the scale of the crimes against humanity committed in the region, despite the fact that the intervention was not authorized by the Security Council.³⁹

In 1999, NATO forces intervened in Kosovo to stop Slobodan Milosevic's ethnic cleansing crusade against ethnic Albanians.⁴⁰ Milosevic's goal was to dismantle any opposition to his regime and permanently establish an ethnic balance in the region.⁴¹ NATO justified the military intervention on the grounds that it was necessary for the region's overall stability.⁴² The Security Council failed to authorize the intervention because of Russia's veto.⁴³

Despite not having Security Council approval for the intervention, U.N. Secretary General Kofi Annan was supportive of NATO's campaign. He stated, "[there] are times when the use of force may be legitimate in the pursuit of peace."⁴⁴ He went on to say that "'ethnic cleansers' and those

34. Battiste, *supra* note 16, at 63.

35. See CASSESE, *supra* note 5, at 373 n.29.

36. *Id.*

37. *Id.*

38. *Id.*

39. EVANS, *supra* note 8, at 129.

40. Battiste, *supra* note 16, at 59-60.

41. *Id.* at 60.

42. *Id.*

43. *Id.*

44. Jane Stromseth, *Rethinking Humanitarian Intervention*, GEORGETOWN LAW MAGAZINE (Spring 2002), <http://www.law.georgetown.edu/alumni/publications/2002/magazine/stromseth.html>.

'guilty of gross and shocking violations of human rights' will find no justification or refuge in the U.N. Charter."⁴⁵ Furthermore, after NATO intervened, the Swedish-sponsored Kosovo Commission sought to make the intervention more acceptable by distinguishing between legitimacy and legality.⁴⁶ It contended that while the intervention may not have been legal, it was nevertheless legitimate.⁴⁷

(iv) Iraq (2003)

The Security Council was again bypassed when the United States and her allies invaded Iraq in 2003 based on notions of self-defense found in U.N. Charter Article 51.⁴⁸ The alleged goals were to disarm Iraq of weapons of mass destruction, end Saddam Hussein's support of terrorism, and free the Iraqis from a brutal regime.⁴⁹ However, no weapons of mass destruction were found in Iraq, which resulted in the entire legitimacy of the military operation being called into question by many.

The cause of Iraq's intervention in 2003 was found in Iraq's non-compliance with the Gulf War's cease-fire terms throughout the 1990's.⁵⁰ Security Council Resolution 1441 was adopted after the U.N.'s somewhat ineffective handling of Iraq's non-compliance during this time.⁵¹ Resolution 1441 gave Iraq "a final opportunity to comply with its disarmament obligations," and "set up an enhanced inspection regime with the aim of bringing to full and verified completion the disarmament process" established by Resolution 687 and other resolutions.⁵² However, it was evident that the United States would resort to force if necessary.⁵³ The Security Council also declared that "Iraq has been and remains in material breach" of its disarmament obligations, and further failures to comply with Resolution 1441 would "constitute a further material breach."⁵⁴ The British viewed Resolution 1441 as a "second

45. *Id.*

46. EVANS, *supra* note 8, at 139.

47. *Id.* (Fourteen principles were used to determine legality versus legitimacy.)

48. *Id.* at 132.

49. President George W. Bush's Radio Address, *President Discusses Beginning of Operation Iraqi Freedom* (Mar. 22, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html>.

50. See Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 150-52 (1999); Ruth Wedgwood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction*, 92 AM. J. INT'L L. 724, 724-25 (1998).

51. Jane E. Stromseth, *Law and Force After Iraq: A Transitional Moment*, 97 AM. J. INT'L L. 628, 630 (2003).

52. S.C. Res. 1441, ¶ 2, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

53. Stromseth, *supra* note 51, at 630.

54. S.C. Res. 1441, *supra* note 52, ¶ 1, 4.

resolution,” and wanted to achieve a consensus in the Security Council.⁵⁵ The United Kingdom especially wanted to enhance the legitimacy of any later forceful action by working within the confines of the U.N. Charter.⁵⁶

The United Kingdom’s Prime Minister, Tony Blair, and his Foreign Secretary, Jack Straw, argued for a unified force with the Security Council’s approval.⁵⁷ France refused to authorize force under any circumstances.⁵⁸ The United States, the United Kingdom, and several other notable allies forcibly intervened anyway, which was supposedly acceptable under Security Council Resolution 1441. However, their actions have been greatly criticized.⁵⁹ Nevertheless, immediately before the invasion, Tony Blair spoke about the use of force and its consistency with Security Council demands on Iraq.⁶⁰ Blair argued that the U.N.’s weak stance on Iraq’s non-compliance undercut its credibility and sent a poor message to other dictators and tyrants.⁶¹ He stated, “to will the ends but not the means . . . would do more damage in the long run to the U.N. than any other course.”⁶²

Some have called the Iraq military intervention the “death” of the U.N. Charter and the end of “the grand attempt to subject the use of force to the rule of law.”⁶³ Experts agree that this morbid assertion was premature, but it was clear that the pendulum had swung towards the use of legitimate and legal force only with Security Council approval.⁶⁴ However, the question now is whether the legitimacy of the use of force only with Security Council approval is still true after the atrocities committed in Sudan, especially in the Darfur region.

(v) Sudan (2003-Present)

Sudan is the largest state in Africa.⁶⁵ It has also been constantly immersed in civil wars since its independence from Great Britain in

55. Stromseth, *supra* note 51, at 631.

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.*

60. Tony Blair, *PM Statement Opening Iraq Debate in Parliament* (Mar. 18, 2003), <http://www.number-10.gov.uk/output/Page3294.asp>.

61. *Id.*

62. *Id.*

63. Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16, 24 (May/June 2003).

64. *See* Stromseth, *supra* note 51, at 629.

65. Battiste, *supra* note 16, at 51.

1956.⁶⁶ The predominately Muslim government exists in the North, while most of the non-Muslims, many of whom are Christian – mostly Catholics and Anglicans – reside in the South.⁶⁷ Since its independence, over two million people, mostly Christian, have been killed in the conflict.⁶⁸

The crisis primarily took place in a region known as Darfur, which is a diverse area home to Arabs and other African groups including the Masalit, Fur, and the Zaghawa.⁶⁹ These three groups, who are mainly farmers, have borne the brunt of North Sudan's policies.⁷⁰ The early part of the conflict involved a clash over land between Arab nomads and the African farming villages.⁷¹ The Fur began resisting nomadic intrusions on their land, which resulted in government hostilities against the Fur.⁷² Eventually, the Fur formed militias, which later became part of the Sudanese Liberation Army ("SLA"), a rebel group.⁷³ In the 1990s, Arab nomads moved onto land mostly held by the Masalit farmers, which resulted in further armed hostilities between the two groups.⁷⁴ The government ended the violence, but tension continued between the Arab nomads and black African groups.⁷⁵ During the following years, the Sudanese government failed to improve roads and public services used primarily by black African groups and awarded top government posts to Arabs.⁷⁶

Hostilities boiled over early in the morning on April 25, 2003 when a SLA bomb exploded at a small airport where Sudanese soldiers were located.⁷⁷ The SLA then killed the remaining soldiers, took over the military outpost, and captured the head of the Sudanese Air Force.⁷⁸ Sudan's government responded by coordinating air strikes with the local, newly-armed Arab tribesmen known as the *janjaweed*.⁷⁹ This strategy

66. U.S. Central Intelligence Agency, *The World Factbook: Sudan* (2011), <https://www.cia.gov/library/publications/the-world-factbook/geos/su.html>.

67. Hope for the Future International, *Christianity in Southern Sudan: The History of Christianity in Sudan*, <http://www.hopeforthefutureinternational.org/about-southern-sudan-christianity.php> (last visited Apr. 29, 2011); Battiste, *supra* note 16, at 51.

68. Battiste, *supra* note 16, at 51.

69. *Id.*

70. *Id.*

71. *See id.* at 52.

72. *Id.* at 52.

73. *Id.*

74. *Id.*

75. *Id.* at 53.

76. *Id.*

77. *Id.*

78. Samantha Power, *Dying in Darfur*, 80 THE NEW YORKER 58, (Aug. 30, 2004). Available at: http://www.newyorker.com/archive/2004/08/30/040830fa_fact1.

79. *Id.*

laid the foundation for the later brutalities committed against the unarmed black African citizens, including mass murder and rape.⁸⁰ Since 2003, at least 70,000 civilians have been killed in Darfur and approximately 1.85 million people have been internally displaced.⁸¹

Again, the international community failed to act promptly to prevent this humanitarian catastrophe. In fact, at first, only the United States referred to this crisis as genocide.⁸² Over a year after the conflict first began, the SLA and the Sudanese Government signed a temporary cease-fire with the African Union agreeing to send unarmed troops to monitor the situation.⁸³ It was only in late July 2004 that the Security Council passed a resolution imposing an arms embargo on the fighting forces and threatened the government with other actions such as freezing assets or issuing a travel ban.⁸⁴ Finally, in February 2005, the Security Council approved sending 10,000 troops as part of a U.N. peacekeeping mission – nearly two years after the violence began.⁸⁵

In 2008, Omar al-Bashir, Sudan's current president, was indicted for genocide by the International Criminal Court.⁸⁶ Southern Sudan held a referendum on whether to remain part of Sudan in early 2011.⁸⁷ The people of Southern Sudan overwhelmingly voted for their independence from the North and will likely become an independent state by July 2011.⁸⁸

Having laid out the historical framework for intervention with or without Security Council approval up to the present day, it is now necessary to

80. Battiste, *supra* note 16, at 53-55.

81. *Id.* at 49.

82. See Dana Milbank, *Denying Genocide in Darfur – And Americans Their Coca-Cola*, WASH. POST, May 31, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/30/AR2007053002157.html>. See also U.N. News Centre, *U.N. Commission Finds Sudanese Government Responsible for Crimes in Darfur* (Feb. 1, 2005) (The United Nations referred to the crisis as a series of “indiscriminate attacks” but not genocide). Available at: [http://www.un.org/apps/news/story.asp?NewsID=13199&CR=sudan&CrI=](http://www.un.org/apps/news/story.asp?NewsID=13199&CR=sudan&CrI=;); Battiste, *supra* note 16, at 50.

83. Battiste, *supra* note 16, at 58.

84. *Id.*

85. *Id.* at 50, 58-59.

86. *Sudanese President is Charged with Genocide*, MSNBC, July 14, 2008, http://www.msnbc.msn.com/id/25671505/ns/world_news-africa/

87. Josh Kron, *Big Push in South Sudan Before Vote*, N.Y. TIMES, Dec. 9, 2010, <http://www.nytimes.com/2010/12/10/world/africa/10sudan.html?partner=rss&emc=rss>

88. Faith Karimi, *Report: Vote For Souther Sudan Independence Nearly Unanimous*, CNN, Jan. 22, 2011, http://articles.cnn.com/2011-01-22/world/sudan.referendum.results_1_preliminary-results-official-results-election-officials?_s=PM:WORLD; *Sudan Referendum: What's Being Voted On and What Will Happen?*, THE TELEGRAPH, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/8246615/Sudan-referendum-whats-being-voted-on-and-what-will-happen.html> (last visited May 30, 2011).

turn to the Genocide Convention and how humanitarian intervention relates to the crime of genocide.

B. THE GENOCIDE CONVENTION

The definition of genocide is the “intentional killing, destruction, or extermination of a group or members of a group as such”⁸⁹ Historically, genocide was thought of as a crime against humanity, not as its own distinct offense.⁹⁰ For instance, the Tokyo International Tribunal never specifically mentioned genocide when dealing with the Holocaust; instead, the crime was considered was one of persecution.⁹¹

Genocide became a specific crime in 1948 with the adoption of the U.N. Genocide Convention.⁹² The Genocide Convention carefully defines the crime: it punishes more than genocide itself but also acts connected with genocide, such as conspiracy to commit genocide; it affirms that genocide can occur during wartime and peacetime; and it establishes individual criminal responsibility along with international state responsibility.⁹³ The Genocide Convention is widely acknowledged as representing customary international law as well as holding to a status of *jus cogens*.⁹⁴ Importantly, *jus cogens* is a peremptory norm of international law upon which no derogation is possible.⁹⁵ Accordingly, *jus cogens* is afforded the highest status in international law and, in some ways, is akin to natural law.⁹⁶

The Genocide Convention has a specific act and specific intent requirement.⁹⁷ It requires that the genocidal conduct (a) include the killing of members of a racial, ethnic, or religious group; (b) cause serious mental or bodily harm to members of the group; (c) bring about the group’s physical destruction in whole or in part; (d) prevent births within the group; or (e) forcibly transfer children of the group to another group.⁹⁸ The conduct does not need to be systematic or widespread for there to be genocide, although this is often the case.⁹⁹

89. CASSESE, *supra* note 5, at 442.

90. *Id.* at 442-43.

91. *Id.* at 443.

92. *Id.*

93. *Id.*

94. *Id.* at 444.

95. *Id.*

96. See, e.g., LAURI HANNIKAINEN, PEREMPTORY NORMS (*JUS COGENS*) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 357-424 (Coronet Books, Inc).

97. CASSESE, *supra* note 5, at 444-45.

98. *Id.* at 444.

99. *Id.*

The *mens rea*, or specific intent, of genocide is that the perpetrator committed one of the aforementioned acts intending to destroy the group in whole or in part.¹⁰⁰ Murder, for example, is the means while the goal or end, would be the group's destruction. Therefore, genocide cannot exist when the conduct is negligent or even reckless.¹⁰¹

Although the Genocide Convention does many things well, it is not without its problems. For example, the Genocide Convention's definition of genocide has been criticized as not being broad enough to include cases of cultural genocide or genocide on political grounds.¹⁰² Moreover, the enforcement of the Genocide Convention has not been very effective.¹⁰³ In the history of the U.N., the General Assembly pronounce a case of genocide only once in *Sabra and Shatila* in 1982.¹⁰⁴ Moreover, in the sixty years since the Genocide Convention's passage, very few prosecutions for genocide have occurred globally.¹⁰⁵

(i) The Duty to Prevent Genocide

Article 1 of the Genocide Convention provides that contracting states have a duty to prevent genocide.¹⁰⁶ In practice, in 1993, with the outbreak of war in Bosnia, some argued that states have the duty to prevent genocide.¹⁰⁷ As Judge Lauterpacht wrote, "[t]he duty to 'prevent' genocide is a duty that rests upon all parties and is a duty owed by each party to every other [*erga omnes*]."¹⁰⁸ This viewpoint corresponded with the early International Court of Justice case *Barcelona Traction*.¹⁰⁹

In the 2005 Outcome Document of the Summit of Heads of State and Government, the International Court of Justice ("ICJ") embraced this "responsibility to protect" for crimes of genocide.¹¹⁰ The Court made this responsibility a treaty obligation for those states that ratified Genocide

100. *Id.* at 445.

101. *Id.*

102. *Id.* at 443.

103. See UNGA Resolution 37/123 D of 16 December 1982 (the only time the General Assembly proclaimed a situation constituted genocide under the Convention.).

104. *See id.*

105. CASSESE, *supra* note 5, at 443 n.19.

106. Convention on Prevention and Punishment of the Crime of Genocide, art.1, Jan. 12, 1951, 78 U.N.T.S. 277.

107. SCHABAS, *supra* note 33, at 527 (Judge Lauterpacht's comments).

108. *Id.*

109. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5, 1970); *see also* SCHABAS, *supra* note 33, at 527 (Judge Lauterpacht's comments).

110. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138-39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

Convention Article IX without reservation.¹¹¹ Moreover, regarding the responsibility to protect, the Court saw no distinction between genocide committed on a state's own soil and genocide committed elsewhere.¹¹² It is now clear that the duty to prevent genocide is not confined to a state's own territory.¹¹³

In the *Case Concerning the Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the ICJ also affirmed that, when carrying out the duty to prevent genocide, states must still act according to established international law principles and with respect for the U.N. Charter.¹¹⁴ The Court did not go so far as to hold that the duty to prevent genocide, or the responsibility to protect those groups suffering from genocide, trumps the U.N. Charter or allows states to intervene without Security Council approval.¹¹⁵ Nevertheless, as renowned experts agree, the duty to prevent genocide is "very much a work in progress."¹¹⁶

In the *Case Concerning the Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice further clarified the duty to prevent genocide. State responsibility under the duty to prevent genocide, according to the Court, is triggered when the state involved fails to take all measures within its power to prevent the crime.¹¹⁷ The obligation "varies greatly from one State to another," and depends on a state's capacity to influence events.¹¹⁸ Factors such as geographic proximity and the strength of ties between the states should be considered.¹¹⁹

Having now established what the Genocide Convention is and what it does, the next section will discuss the current law of humanitarian intervention.

111. *Id.*

112. *Id.*; see also SCHABAS, *supra* note 33, at 524.

113. SCHABAS, *supra* note 33, at 524.

114. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. ¶ 426 (Feb. 26).

115. *Id.*; see also SCHABAS, *supra* note 33, at 525.

116. SCHABAS, *supra* note 33, at 533.

117. *Id.* at 521.

118. *Id.*

119. *Id.* at 521-22.

II. THE LAW OF HUMANITARIAN INTERVENTION AS IT STANDS TODAY

A. BASIC PRINCIPLES OF NON-INTERVENTION

U.N. Charter Article 2(4) makes clear that all states “shall refrain in their international relations from the threat or use of force”¹²⁰ According to the U.N. Charter, states are justified in using force only when authorized by the Security Council to prevent the most serious threats to peace under Article 42, or in cases of self-defense under Article 51.¹²¹ Therefore, in many ways, international peace and security firmly rests with the five permanent members of the Security Council: The United States, France, Great Britain, Russia, and China.

(i) Unilateral Intervention Without Security Council Approval

By the late 1990s, many international experts suggested that, due to the responsibility to protect and the duty to prevent genocide found in the Genocide Convention, unilateral humanitarian intervention was required even in cases where the Security Council failed to authorize such action.¹²² The concept of humanitarian intervention without Security Council approval, although not a new phenomenon, took further root in NATO’s intervention in Kosovo.¹²³ It was even argued that the duty to prevent genocide, not just the duty not to engage in genocide, had reached the level of *jus cogens*.¹²⁴ Therefore, any incompatible duty – even one in the U.N. Charter – could not stand in the way of states fulfilling this *jus cogens* obligation.¹²⁵

More recently, however, justifying humanitarian intervention when the Security Council has not authorized the use of force has been not been favored by the international community in the wake of Iraq’s invasion in 2003.¹²⁶ For instance, the International Court of Justice in *Nicaragua* (merits) (§268) held that state parties agreed that “whether the response to the [armed] attack is lawful depends on observance of the criteria of necessity and the proportionality of the measures taken in self-defence.”¹²⁷ Experts like Antonio Cassese, despite some state practices

120. U.N. Charter art. 2, para 4.

121. U.N. Charter arts. 42, 51; CASSESE, *supra* note 5, at 373.

122. SCHABAS, *supra* note 33, at 530.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 531.

127. Case Concerning the Military and Paramilitary Activities In And Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 194 (June 27).

124 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XVII]

to the contrary, have gone so far as writing, “. . . legally entitling individual States to take forcible measures to induce a State engaging in gross and large-scale violations of human rights to terminate such violations, has not crystallized.”¹²⁸

However, even Cassese notes that the *opinio juris* for unilateral humanitarian intervention is internationally widespread.¹²⁹ *Opinio juris*, after state practice, is the second element in customary international law, and it stands for the position that states act under a belief that they are legally obligated to do so.¹³⁰ For example, the 2000 Constitutive Act of the African Union, a treaty ratified by 53 African States, holds that there is a right to intervene, if allowed by the African Assembly, when there are grave human rights violations such as genocide.¹³¹ This seems, at the least, to directly contravene the U.N. Charter, which requires that the Security Council, and only the Security Council, may authorize the use of force.

The World Summit in 2005 demonstrated a renewed commitment to the U.N.'s general prohibition on the use of force, especially unilateral use of force.¹³² The Summit Outcome Document, which was unanimously decided, once again asserted that the Security Council was the sole international body for authorizing the use of force.¹³³ Therefore, it seems likely that the law surrounding humanitarian intervention continues to require that the use of force be authorized by the Security Council or be used in cases of self-defense.

Having reaffirmed the international commitment to the Security Council, the question now turns to what the future of international law will be for intervention in mass atrocities.

III. THE FUTURE OF HUMANITARIAN INTERVENTION AS *JUS COGENS*

At least one advocate for human rights has expressed the opinion that “[a]ll notions of sovereignty with respect to Rwanda should be

128. CASSESE, *supra* note 5, at 374.

129. *Id.*

130. ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 69 (Cambridge Univ. Press 1995) (“[State practice] . . . is the repetition of conduct by an increasing number of States, accompanied at some stage by the belief that this conduct is not only dictated by practical (economic, military, political) reasons, but is also imposed by some sort of legal command [*opinio juris*].”).

131. CASSESE, *supra* note 5, at 374.

132. EVANS, *supra* note 8, at 132.

133. *Id.*

completely forgotten and we should just go in and stop the killing.”¹³⁴ While the law may currently favor the position that humanitarian intervention is only legal when authorized by the Security Council, or in cases of self-defense, the question is, should it be?

A. EMPIRICAL EVIDENCE DOES NOT SUPPORT THE PRETEXT ARGUMENT JUSTIFYING NON-INTERVENTION

Perhaps the main reason scholars, international lawyers, and the international community support the principles in U.N. Charter Article 2(4) and the idea that the use of force is only justified in cases of self-defense or when authorized by the Security Council is that, if states could, they would use humanitarian intervention as a pretext for satisfying their own selfish ends.¹³⁵ Recent empirical evidence, however, suggests that unilateral humanitarian intervention would have little effect on the frequency of unjustified and aggressive wars, and in some cases, may even reduce the number of such wars.¹³⁶ According to at least one scholar, essentially not enough attention is paid to domestic political and social factors forcing state officials to justify their aggressive tendencies.¹³⁷ Moreover, “encouraging aggressive states to justify using force as an exercise of humanitarian intervention can facilitate conditions for peace between those states and their prospective targets.”¹³⁸ Therefore, if new empirical evidence shows that pretext is not one of the horrible consequences awaiting the legalization of unilateral humanitarian intervention, little else should justify states not meeting the duty to prevent genocide, or having that duty be regarded as *jus cogens*.

B. RECOGNIZING THE DUTY TO PREVENT GENOCIDE AS *JUS COGENS*

Those who envision a different method of preventing human rights catastrophes rather than relying on action by the Security Council typically do so in two main ways.¹³⁹ First, there are those who argue that customary international law has indeed crystallized to allow state

134. Nobel Laureate Wole Soyinka, May 1994, quote in L.A. TIMES May 11, 1994, at B7.; see also Ian Browlie, *Thoughts on Kind-Hearted Gunmen*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 139 (Richard B. Lillich ed., 1973) (calling this view the position of the Kind-Hearted Gunmen).

135. Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 113 (2006).

136. *Id.* at 107. (“In this article, I argue that it is just as likely, or even more likely, that the impact on states would be the opposite. Drawing on recent empirical studies, I contend that legalizing [unilateral humanitarian intervention] should in important respects *discourage* wars with ulterior motives.”).

137. *Id.* at 109-110.

138. *Id.* at 110.

139. EVANS, *supra* note 8, at 136.

intervention for serious human rights reasons even without authority from the Security Council.¹⁴⁰ Second, there are those who believe the Security Council system should be strongly reformed or replaced entirely.¹⁴¹ This Article accepts a third justification for rethinking the law of unilateral humanitarian intervention – that the duty to prevent genocide should be, if it is not already, *jus cogens*.

Under international law, only the highest of legal principles is afforded *jus cogens* status.¹⁴² According to the Inter-American Commission on Human Rights, *jus cogens* derives “their status from fundamental values held by the international community, as violations of such preemptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence.”¹⁴³ Common examples of *jus cogens* norms are the prohibitions on genocide and slavery, although many scholars have noted that the duty to prevent genocide must be counted among this group.¹⁴⁴

Moreover, the founder of modern international law, Jesuit scholar Francisco Suarez, strongly believed that the right of self-defense is the “greatest of rights.”¹⁴⁵ Following this logic, some have argued that the duty to prevent genocide as *jus cogens* naturally flows from even the foundation of international law.¹⁴⁶ As *jus cogens*, the duty to prevent genocide would be superior to all other international obligations, including the sole right of the Security Council to approve the use of force found in U.N. Charter Article 42 and the right of self-defense in Article 51.¹⁴⁷

Conversely, international scholar William Schabas rejects the idea that a *jus cogens* duty to prevent genocide could somehow trump the U.N. Charter. He writes:

140. *Id.*

141. *Id.*

142. See David B. Kopel, Paul Gallant, & Joanne D. Eisen, *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275, 1327 (2006); M.N. Shaw, *Genocide and International Law*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 797, 800 (Yoram Dinstein ed., 1989); Louis Rene Beres, *After the Gulf War: Prosecuting Iraqi Crimes Under the Rule of Law*, 24 VAND. J. TRANSNAT'L L. 487, 490-91 (1991); Amnesty Int'l, *United States of America: A Killing that No Respectable Government Can Condone*, AI Index AMR 51/033/2003 (Mar. 4, 2003).

143. *Domingues v. United States*, Case 12.285, Inter-Am. Ct. H.R., Report No. 62/02 (Oct. 22, 2002).

144. See *id.*; Kopel et al., *supra* note 142, at 1328.

145. Kopel et al., *supra* note 142, at 1328.

146. *Id.*

147. *Id.*

Perhaps the most serious objection to the idea that humanitarian intervention to prevent genocide is permissible because it is a *jus cogens* norm is the fact that the prevention of the use of force subject to the two exceptions mentioned in the Charter, Chapter VII action and self-defence, is also a *jus cogens* norm.¹⁴⁸

Other scholars like Mark Toufayan disagree with Schabas' interpretation.¹⁴⁹ Schabas fails to fully distinguish between the prohibition against genocide, which is *jus cogens*, and the duties flowing from the norm.¹⁵⁰ The relationship between the duty to prevent genocide and the prohibition against the use of force do not conflict, because "an intervening state or group of states agrees to violate a *jus cogens* rule in order to prevent the violation of another rule of the same character."¹⁵¹

Moreover, because these are competing equal *jus cogens* norms – the duty to prevent genocide versus the prohibition on the use of force found in U.N. Charter Article 2(4) – methods of reconciliation should be used.¹⁵² Accordingly, the two competing norms should be interpreted harmoniously so that the apparent conflict is not, in fact, genuine.¹⁵³ For example, U.N. Charter Article 2(4) prohibits the use of force only in a "manner inconsistent with the Purposes of the United Nations."¹⁵⁴ However, the duty to prevent genocide is consistent with the "Purposes of the United Nations," because preventing genocide, at its essence, is about "reaffirm[ing] faith in fundamental human rights," and "[saving] succeeding generations from the scourge of war" – language found in the Preamble to the U.N. Charter.¹⁵⁵ Lastly, the duty to prevent genocide is an absolutist principle, unlike the prohibition on the use of force in Article 2(4), which permits two exceptions.¹⁵⁶ Therefore, if ever in conflict, the duty to prevent genocide should always prevail.

The duty to prevent genocide will be seen as a *jus cogens* obligation sometime in the near future, if it is not already. As seen above, there

148. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 502. (Cambridge Univ. Press, 2000)

149. Mark Toufayan, *The World Court's Distress When Facing Genocide: A Critical Commentary on the Application of the Genocide Convention Case (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, 40 TEX. INT'L L.J. 233, 257-258 (2005).

150. *Id.*

151. *Id.*

152. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Rep. of the Int'l Law Comm'n, 58th sess, May 1-June 9, July 3-Aug. 11, 2006, 25, U.N. Doc.A/CN.4/L.682 (2006).

153. *Id.* at 27.

154. U.N. Charter art. 2, para 4.

155. U.N. Charter preamble.

156. *See id.* at arts. 41, 52.

need not be a conflict between the prohibition on the use of force and the duty to prevent genocide. Moreover, the fear that states will use humanitarian intervention as a pretext for their own aggressive tendencies is not empirically supported. Therefore, little stands in the way of international law allowing states the right to intervene in grave human rights catastrophes, such as in cases of genocide. Thus, the duty to prevent genocide, like the prohibition on genocide, should be *jus cogens*.

IV. CONCLUSION

The old notions of sovereignty cannot be allowed to stand in the way of human rights. International law is changing, and changing quickly. Genocide is rightfully considered the “crime of crimes,”¹⁵⁷ and international law should reflect this. The law in most instances follows reason and prevailing morality, and reason and morality call for greater intervention to prevent human rights catastrophes. The pendulum is swinging this way after Sudan. Someday soon the law will reflect the truth that perhaps the only thing worse than genocide itself is knowing about it and doing nothing. Some states, such as the United States, seem willing to act – sometimes rightly (Kosovo) and sometimes wrongly (Iraq) – to address the gravest human rights violations. Other states, such as Vietnam in Cambodia and France in the Central African Republic, have at one time or another also fought against human rights violations. Someday soon the duty to prevent genocide will be *jus cogens*. Until that day, states must be ready to violate international law because the international community can ill afford another Sudan, Kosovo, Rwanda, or Holocaust.

157. See generally SCHABAS, *supra* note 33.